

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE NAMENDA DIRECT PURCHASER ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: All Direct Purchaser Actions	Case No. 1:15-cv-07488-CM-RWL
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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN*
LIMINE NO. 12: EXCLUDE EVIDENCE OF ANY PARTY'S SIZE OR
FINANCIAL CONDITION**

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I. ARGUMENT

Plaintiffs respectfully request that Forest be precluded from offering evidence or argument at trial of its, or any plaintiff's, size or financial condition.

Forest may seek to portray itself as small in relation to certain Plaintiffs or absent class members, or susceptible to ruin from a verdict. Relatedly, Forest may seek to portray Plaintiffs as large or well-funded. Any evidence regarding the size or financial condition of the parties on either side, however, is entirely irrelevant to any issue in the trial and should be excluded under Federal Rule of Evidence 401. *E.g., In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO, 2018 WL 7814761, at *6 (N.D. Cal. Feb. 7, 2018) (granting motion *in limine* to exclude evidence of any party's size or financial condition); *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 266 (2d Cir. 1999) ("Evidence of wealth ... is generally inadmissible in trials not involving punitive damages.") (citing Joseph M. McLaughlin, *Weinstein's Federal Evidence* § 401.08[6] (2d ed.1998)); *Martin v. Interstate Battery Sys. of Am.*, 12-cv-184-JED-FHM, 2016 WL 4401105, at *1-2 (N.D. Okla. Aug. 18, 2016) (evidence of defendant's size or financial condition excluded during liability and compensatory damages phases); *Farris v. Int'l Paper Inc.*, 5:13-cv-00485-CAS(SPx), 2014 WL 6473273, at *22 (C.D. Cal. Nov. 17, 2014) (granting motion to exclude evidence of defendant's size or financial condition); *Dixon v. Verhey*, 8:13cv111, 2014 WL 3535067, at *2 (D. Neb. July 17, 2014) (financial condition of both plaintiff and defendants was irrelevant); *Khan v. H&R Block E. Enter., Inc.*, No. 11-20217-civ, 2011 WL 4715201, at *2 (S.D. Fla. Oct. 5, 2011) (same).

In particular, Forest may seek to mention the financial status of certain class members, *e.g.*, AmerisourceBergen, Cardinal Health, and McKesson, whom defendants have described pejoratively as the "Big Three." Forest's Opp'n to Mot. for Class Certification at 17, 19, 21 (ECF No. 619). The comparative size of any class member is irrelevant, however. Given the

Court's Order certifying the class and finding the class representatives adequate under Rule 23(a)(4), and the Second Circuit's denial of Forest's Rule 23(f) petition, any discussion of the relative size of class members also would be prejudicial if offered to somehow cast doubt on the propriety of this action proceeding as a class action. There is simply no valid reason for the jury to hear about whether some class members are big or small.

Dated: May 24, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, I electronically filed the above by CM/ECF system.

Respectfully submitted,

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